No. 86-815

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1986

JOHN F. DUFFY,

Petitioner,

v.

JUDITH A. WARD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a local government official is required to anticipate later court decisions in order to be immune from liability under civil rights acts pursuant to qualified immunity principles.

2. Whether a local government official is required to establish the existence of authority affirmatively approving his or her actions in order to be held immune.

3. Whether a local government official is entitled to the qualified immunity from liability where he acts in accordance with state court orders directed to him.

PARTIES TO PROCEEDINGS BELOW

Judith A. Ward, respondent herein, filed the action in the United States District Court for the Southern District of California. She filed the action as a class action; the class has never been certified.

John F. Duffy, Sheriff of the County of San Diego, California, petitioner herein, was a defendant below. Also named as defendants were the County of San Diego and its Board of Supervisors. The action against both the County and its Board of Supervisors was dismissed by the district court in 1983. They are not parties to this petition.

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No. _____

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

To The Honorable William H. Rehnquist, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

John F. Duffy, Sheriff of the County of San Diego, California, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The amended opinion and judgment of the court of appeals which is the subject of this petition (App. A, *infra*) is reported at 791 F.2d 784 (No. 84-6362). The original opinion of the court of appeals is reported at 783 F.2d 1385. The judgment of the district court (App. B, *infra*) is not reported.

JURISDICTION

The amended opinion and judgment of the court of appeals was entered June 16, 1986. A timely petition for rehearing was denied on August 20, 1986 (App. C, *infra*).

The jurisdiction of this Court is invoked under 28 United States Code section 1254(1).

STATUTORY PROVISION INVOLVED

The Civil Rights Act of 1871, 42 United States Code section 1983, provides,

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

Respondent was arrested in May 1981 by City of San Diego police officers on a California law misdemeanor charge (following her refusal to sign a traffic citation) and taken to one of the detention facilities of petitioner, a county sheriff, where she was required to undergo a strip and visual body cavity search for security purposes. She contended that her civil rights were violated because California law, section 853.6(i) of the Penal Code, requires an "immediate" determination of "own recognizance" (O.R.) release eligibility and she ultimately received such a release, but not without first having undergone the detention facility search. Petitioner maintained that the security search was necessary and also claimed a qualified immunity from liability.

The action, filed October 20, 1982, was brought under the Civil Rights Act of 1871, 42 United States Code section 1983. A motion for preliminary injunction was filed concurrently. Petitioner was enjoined by the district court by order entered February 7, 1983. The preliminary injunction prohibited strip or visual body cavity searches of persons received at petitioner's detention facilities on misdemeanor charges until custodial officers determined whether an O.R. release would be given. Petitioner appealed from the preliminary injunction and the court of appeals later vacated the injunction on the ground that respondent lacked standing to have sought and received that relief (*Ward v. Duffy,* 732 F.2d 165 (9th Cir. 1984), No. 83-5633).[1]

The balance of respondent's action, the claim for damages, was dismissed by the district court by order entered August 2, 1984, on the motion of petitioner for summary judgment (App. B, *infra*). The trial court granted the motion on petitioner's contention that he was

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[1] The subject security search was restricted by state legislation (Cal.Stats. 1984, ch. 35, § 2, p. ____, eff. March 31, 1984, enacting Cal. Pen. Code, § 4030).

immune from liability under the qualified immunity principles enunciated in the case of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The district court agreed with petitioner that he had not violated any clearly established statutory or constitutional right of plaintiff. Respondent appealed the dismissal to the court of appeals (No. 84-6362). She also appealed the denial of her motion for an attorney's fee with respect to the vacated preliminary injunction. The attorney's fee issue is not now pertinent or raised here.

The court of appeals reversed the district court's determination that petitioner is immune from liability. The original appellate decision was filed March 3, 1986 (783 F.2d 1385). The court of appeals filed its subject amended opinion on June 16, 1986 (791 F.2d 1329, App. A, *infra*).

Petitioner had filed a petition for rehearing on March 17, 1986, following the original opinion of the court of appeals. That petition was denied by order filed August 20, 1986 (App. C, *infra*).

Questions regarding the constitutionality of the strip search are no longer at issue. Only issues relating to petitioner's claim of immunity from respondent's claim remain.

EXISTENCE OF JURISDICTION BELOW

The district court had jurisdiction over the federal civil rights claim under 28 United States Code section 1343(3).

REASONS FOR GRANTING THE PETITION

I. THE APPELLATE COURT HAS MISINTERPRETED QUALIFIED IMMUNITY PRINCIPLES BY REQUIRING AN OFFICIAL TO ANTICIPATE FUTURE LEGAL DEVELOPMENTS AND TO ESTABLISH THE EXISTENCE OF AUTHORITY APPROVING HIS OR HER ACTIONS

The district court held petitioner immune from liability for damages under the civil rights act pursuant to the qualified immunity principles enunciated by this Court in the case of *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). The judgment of the trial court stated in part,

> "When the conduct of which plaintiff now complains occurred in May 1981, the policy in question did not violate clearly established statutory or constitutional rights of which a reasonable person knew or should have known; [¶] . . . Defendant Duffy is immune therefore from civil liability under the Civil Rights Act of 1871, 42 United States Code Section 1983. . . ." (App. B, *infra,* B-2.)

In *Harlow* in 1982 this Court had redefined the qualified or "good faith" immunity in civil rights actions. The Court stated in part as follows:

> "We . . . hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (457 U.S. at 818.)

The Court noted that in *Scheuer v. Rhodes,* 416 U.S. 232 (1974), the qualified immunity for high executives reflected,

> "an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, 438 US, at 504-505, 57 L Ed 2d 895, 98 S Ct 2894, but also 'the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.' Id., at 506, 57 L Ed 2d 895, 98 S Ct 2894." (457 U.S. at 807.)

The Court continued,

> "If the law at that time was not clearly established, *an official could not reasonably be expected to anticipate subsequent legal developments,* nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." (457 U.S. at 818.) (Emphasis added.)

But in this case the court of appeals, in applying the "objective" standard of *Harlow,* has indeed effectively required petitioner to have anticipated "subsequent legal developments." Initially, the Ninth Circuit cites its own previous decision in the case of *Capoeman v. Reed,* 754 F.2d 1512 (9th Cir. 1985), purporting to interpret "the meaning of *Harlow's* 'clearly established' rights standard." (App. *infra,* A-4). If refers to the following portion of *Capoeman* which generally directs a court how to survey decisional law in the absence of binding precedent:

> "We conclude that in the absence of binding precedent, a court should look to whatever decisional law is available to ascertain whether the law is clearly established under the *Harlow* test. [Citation.] But see *Wallace v. King,* 626 F.2d 1157, 1161 (4th Cir. 1980) (immunity allowed where law not authoritatively decided by the Supreme Court, the 'appropriate' court of appeals, or the highest state court), *cert. denied,* 451 U.S. 969, 101 S.Ct. 2045, 68 L.Ed.2d 348 (1981)." (754 F.2d at 1514.)

While one may not disagree with that approach, the Ninth Circuit in *Capoeman* then moves toward requiring officials to anticipate future legal developments. The appellate court stated,

> "Where . . . there are relatively few cases on point, and none of them are binding, an additional factor that may be considered in ascertaining whether the law is 'clearly established' is a determination of the likelihood that the Supreme Court or this circuit would have reached the same result as courts which had previously considered the issue. To make the determination, we examine the legal analysis employed by those courts and compare it to the analysis being used at that time by the Ninth Circuit in related but factually different situations." (754 F.2d at 1515.)

From that perspective the court of appeals in the case at issue here embarks upon a "survey" of "the legal landscape" as it existed at the time respondent was subjected to the facility strip search. (App. A, *infra,* A-4 - A-6.) The court concludes that "the law was sufficiently clear in early 1981 so as to expose a public official who unreasonably authorized blanket strip searches of minor arrestees to civil liability under 42 U.S.C. § 1983." (App. A, *infra,* A-4 - A-5.)

As it commenced its survey, the court noted,

> "As to the strip search policy itself, no published state or federal case since *Schmerber v. California,* 384 U.S. 757 (1966) (test of reasonableness under fourth amendment requires a balancing of the need for particular search against the invasion of personal rights the search entails) upholds the constitutionality of a blanket policy of strip searches of minor offense arrestees." (App. A, *infra,* A-5.)

Has the Ninth Circuit required an official to point to affirmative, approving authority in existence at the time of an action in order to be held immune? Apparently it has, in a stunning "reversal" of *Harlow* which requires only that the official establish the *non-existence* of negative authority.

The cases thereafter cited by the court make it glaringly obvious that the appellate court has departed from *Harlow* principles. Virtually all the cases listed *uphold* the validity of strip searches rather than condemn them. Only two of the decisions mentioned which had existed before May 1981 actually deal with strip searches being conducted as a security measure incident to incarceration and therefore pertinent here.[2] The first, *Logan v. Shealy,* 500 F.Supp. 502 (E.D.Va. 1980), *rev'd,* 660 F.2d 1007 (4th Cir. October 1981), upheld the validity of such searches. Only the other, *Tinetti v. Wittke,* 479 F.Supp. 486, *aff'd,* 620 F.2d 160 (7th Cir. 1980), reached a contrary conclusion. And that case is distinguishable since it involved *non-*misdemeanor traffic offenses, unlike the case here which concerns persons arrested on misdemeanors.

Faced with its survey of cases, none binding precedent, the court of appeals here then noted that the trial court had issued a preliminary injunction against petitioner's security policy and that the appeals court itself later found such searches unconstitutional in the case of *Giles v. Ackerman,* 746 F.2d 614 (9th Cir. 1984). Both judicial pronouncements obviously came well after May 1981 when respondent was subjected to the search. They have been noted, not as they should be for a portrayal of subsequent legal events, but as part of the appellate court's determination that petitioner should have *anticipated* those subsequent legal developments.

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[2] The others deal with issues related to evidence and searches incident to arrest, which are of course significantly different than the questions related to this cause. (*See e.g.. Bell v. Wolfish,* 441 U.S. 520 (1979).)

In contrast with the approach of the Ninth Circuit here, the Second Circuit has held state officials immune from liability for strip searches of prison guards. In the case of *Security and Law Enforcement Employees, Dist. 82 v Carey,* 737 F.2d 187 (2d Cir. 1984), the court acknowledged that officials need not anticipate subsequent legal developments, noting that the subject officials "operated in an area in which the law was not charted clearly." (737 F.2d at 211)

A similar disposition was reached by this Court in the case of *Mitchell v. Forsyth,* 105 S.Ct. 2806 (1985). The Attorney General was held immune from liability for having ordered domestic security wiretaps when their legality was still in question. The Court stated in part as follows:

> "The District Court's conclusion that Mitchell is not immune because he gambled and lost on the resolution of this open question departs from the principles of *Harlow.* Such hindsight-based reasoning on immunity issues is precisely what *Harlow* rejected. The decisive fact is not that Mitchell's position turned out to be incorrect, but that the question was open at the time he acted." (105 S.Ct. at 2820.)

The judgment of the court of appeals here is nothing more than "hindsight-based reasoning". Unable to identify authority which would have "clearly established" the law in May 1981, the appellate court has subverted the teachings of *Harlow.* Petitioner has wrongly been saddled with the obligations to find authority clearly validating his actions, the converse of *Harlow,* and to anticipate future legal developments, what *Harlow* specifically forbids. The judgment here destroys petitioner's ability to rely on the public policy principles of the qualified immunity. The precedent established endangers the protection of countless other government officials who act in good faith in the absence of negative authority.

II. THE COURT OF APPEALS HAS DETERMINED THAT AN OFFICIAL MAY NOT RELY UPON STATE COURT ORDERS AS A BASIS FOR HIS OR HER IMMUNITY

As an additional factor justifying his immunity under *Harlow* principles, petitioner established that the Superior Court of the State of California ruled in the case of *Hudler v. Duffy*, San Diego Superior Court No. 404148, that his strip search policy did not violate federal or state constitutions or 42 United States Code section 1983. The *Hudler* case was a comprehensive class action – a constitutional and statutory challenge to the operations of one of petitioner's detention facilities. That action caused adjudication of claims concerning virtually every aspect of the facilities operations, including the policy of routine strip and visual body cavity searches during the intake and booking process for all persons received at the facility.

Exercising jurisdiction over petitioner, a state/county official, the superior court adjudicated the constitutionality of the questioned strip search policy and determined that no violations of law arose by reason of the policy.

Although the appellate court wrongly read the record to conclude that the judgment in *Hudler* in August 1980 did not involve arrestees like respondent, the court proceeded nonetheless to discuss its affect, assuming its application. The Ninth Circuit stated, "[T]he pronouncement of one state court on a constitutional issue does not necessarily shield a government official from liability." (App. A, *infra*, A-7.) One might well agree if the law was otherwise "clear", i.e., the state court was clearly incorrect. As discussed above, the law was *not* clear. Rather, the only clear direction available was a California superior court order directed to petitioner as a party to the action.

Petitioner was specifically told by the superior court that the policy was constitutional. Petitioner can hardly be charged with notice that courts would later hold otherwise when a court, with full jurisdiction over him, approved the policy a mere nine (9) months before respondent was searched. To determine otherwise is to say that

state/county officials cannot rely upon the rulings of state courts, at least with respect to federal constitutional matters.

In the case of *Malley v. Briggs,* 106 S.Ct. 1092 (1986), this Court recently discussed the qualified immunity and *Harlow* principles. The Court stated, "As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." (106 S.Ct. at 1096.) How can one validly state that petitioner was "incompetent" in following a state court ruling in the absence of any contrary binding appellate decision?

The court of appeals has in effect so ruled. Officials such as petitioner cannot now, should the subject decision stand, rely on state court rulings and expect to be found acting in good faith.

III. CONCLUSION

The subject court of appeals decision addresses an important question of federal law. The interpretation and application of qualified immunity principles conflict with the policy and guidelines previously ennunciated by this Court.

For the reasons discussed above, review by this Honorable Court is necessary to avoid the significant implications of the decision of the court of appeals. Petitioner respectfully submits that his petition for a writ of certiorari be granted.

DATED: November ___, 1986

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JUDITH A. WARD, et. al.,	)	No. 84-6362
	)	D.C. # CV 82-1386-GT (H)
Plaintiffs-Appellants,	)	
	)	AMENDED OPINION
vs.	)	
	)	
COUNTY OF SAN DIEGO, et al.,	)	
	)	
Defendants-Appellees.	)	

Appeal from the United States District Court
for the Southern District of California
Honorable Gordon Thompson, Jr., District Judge, Presiding
Submitted November 4, 1985*
Decided March 3, 1986
Amended June 16, 1986

Before: GOODWIN, TANG, Circuit Judges, and JAMESON**, District Judge.

* The panel unanimously agrees that this case is appropriate for submission without oral argument. Fed. R. App. P. 34(a); 9th Cir. 3(f).

** Honorable William J. Jameson, Senior District Judge for the District of Montana, sitting by designation.

TANG, Circuit Judge:

Appellant Judith Ward initiated this action under 42 U.S.C. § 1983 to recover damages sustained from being strip searched at a San Diego County detention facility. She appeals the district court's grant of summary judgment to appellee John Duffy and the denial of her petition for attorney fees. We reverse in part, affirm in part, and remand.

FACTS

On May 30, 1981 Ward was arrested for the misdemeanor offense of refusing to sign a promise to appear. She was taken to Los [sic] Colinas Womens Detention Facility for booking. In accordance with facility policy, and before a determination was made as to whether she was eligible for an own recognizance (O.R.) release, Ward was required to submit to a strip search that included a visual body cavity inspection.

Ward alleged that the strip search performed under Sheriff John Duffy's authority violated her fourth amendment rights. She filed for preliminary injunction under 42 U.S.C. § 1983. In February 1983 the district court enjoined Duffy's policy of conducting strip searches. We vacated the injunction in March 1984 on the ground that Ward lacked standing to seek injunctive relief. *City of Los Angeles v. Lyons,* 461 U.S. 95 (1983). The case was remanded for further proceedings.

Upon remand, the district court granted Duffy's motion for summary judgment holding that because the law was not clearly established at the time of the strip search, Duffy enjoyed qualified, good faith immunity from personal liability under 42 U.S.C. § 1983. The district court also denied Ward's motion for attorney fees. It held that its initial preliminary injunction, vacated by this court, had no precedential force or force or effect and that Ward could not be considered a prevailing party entitling her to attorney fees under 42 U.S.C. § 1988.

DISCUSSION

JURISDICTION

Duffy contends initially that this court lacks jurisdiction because rather than appealing from the order entering judgment, Ward appealed from the denial of her motion for reconsideration of the summary judgment award. We disagree.

A federal rule of civil procedure 59(e) motion for reconsideration tolls the filing period for an appeal from an order entering judgment. Fed.R.App.P. 4(a)(4)(iii). Properly labeled, Ward's attempted notice of appeal from entry of judgment would have been timely filed.

Ward, however, mistakenly appealed from the district court's denial of Ward's motion for reconsideration. Unless the opposing party can show prejudice, courts of appeal may treat an appeal from a postjudgment order as an appeal from the final judgment. *Foman v. Davis,* 371 U.S. 178, 181 (1962); *Poe v. Gladden,* 287 F.2d 249, 251 (9th Cir. 1961); *Daily Mirror vs. New York News, Inc.,* 533 F.2d 53, 56 (2d Cir. 1976). "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Foman v. Davis* at 181-82.

Because Duffy was neither misled nor prejudiced by Ward's mislabeled appeal, we treat Ward's appeal from the denial of her motion for reconsideration as a timely appeal from the district court's entry of judgment.

QUALIFIED IMMUNITY

Government officials performing discretionary functions are shielded from liability for civil damages if their conduct does not

violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). The *Harlow* test examines the "objective reasonableness" of the official's conduct. In *Capeoman* [sic] *v. Reed,* 754 F.2d 1512, 1514 (9th Cir. 1985), this court interpreted the meaning of *Harlow's* clearly established" rights standard. We concluded that in the absence of binding precedent, a court should look at all available decisional law including decisions of state courts, other circuits, and district courts to determine whether the right was clearly established. *Id.* An additional factor is the likelihood that the Supreme Court or the Ninth Circuit would have reached the same result as courts that had already considered the issue. *Id.* at 1515.

The question of reasonable searches turns on a balancing of the interests and facts in particular circumstances. *Bell v. Wolfish,* 441 U.S. 520 (1979). Although a less stringent standard than probable cause may perhaps justify strip searches of minor offense arrestees, *see id.* at 560, the facts upon which a strip search is based must be capable of measurement against some objective standard. *Delaware v. Prouse,* 440 U.S. 648, 654 (1979).

We first note that *Capeoman* [sic] places the responsibility for keeping abreast of constitutional developments in criminal law squarely on the shoulders of law enforcement officials. Given the power of such officials over our liberty, and sometimes even over our lives, this placement of responsibility is entirely proper. Law enforcement officials must be cognizant not only of how far their authority extends, but also of the point at which their authority ends. At the same time, however, we do not read *Capeoman* [sic] to require of most government officials the kind of legal scholarship normally associated with law professors and academicians. A reasonable person standard adheres at all times.

With the foregoing in mind, we survey the legal landscape in May of 1981 and we conclude that the law was sufficiently clear in early 1981 so as to expose a public official who unreasonably authorized

blanket strip searches of minor offense arrestees to civil liability under 42 U.S.C. § 1983.

As to the strip search policy itself, no published state or federal case since *Schmerber v. California,* 384 U.S. 757 (1966) (test of reasonableness under fourth amendment requires a balancing of the need for particular search against the invasion of personal rights the search entails) upholds the constitutionality of a blanket policy of strip searches of minor offense arrestees. In balancing arrestees' fourth amendment rights against the security problems in detention facilities, courts upheld the practice of strip searches on two sometimes overlapping grounds. First, a strip search could be justified if the arrest was custodial. *See e.g., United States v. Robinson,* 414 U.S. 218, 235 (1973) (full search incident to custodial arrest for probable cause is reasonable); *Logan v. Shealy,* 500 F. Supp. 502 (E.D. Vir. 1980) (strip search of DWI arrestee held for four hours or until some responsible person could pick arrestee up is reasonable), *reversed,* 660 F.2d 1007 (4th Cir. October 1981), *cert. denied,* 455 U.S. 942 (1982); *People v. Seymour,* 84 Ill. 2d 14, 416 N.E.2d 1078 (1981) (strip search incident to custodial arrest where officers reasonably suspected arrestee possessed both a weapon and contraband is reasonable).

Second, a strip search could be justified if the arresting officer had at least a reasonable suspicion that the arrestee possessed a weapon or contraband. *United States v. Klein,* 522 F.2d 296 (1st Cir. 1975) (probable cause that arrestee possessed contraband justified strip search). *Armstrong v. Borie,* 494 F. Supp. 902 (E.D. Penn. 1980) (reasonable suspicion that arrestee possessed dangerous object (keys) justified strip search). *See also Bell v. Wolfish,* 441 U.S. 520 (1979) (strip search of pre-trial detainees after contact visit is reasonable).

In *Tinetti v. Wittke,* 479 F. Supp. 486, 490 (E.D.Wis. 1979), *aff'd,* 620 F.2d 160 (7th Cir. 1980), a case similar to our own, both the district court and the Seventh Circuit found unconstitutional a strip search of a person arrested for a non-misdemeanor traffic viola-

tion who was unable to post a $40 cash bond. There, as here, no reasonable suspicion existed that a weapon or contraband would be discovered on the arrestee. We find the fact that the arrestee in *Tinetti* was charged with a non-misdemeanor traffic violation whereas Ward was charged with a misdemeanor of refusing to sign a promise to appear to be a distinction of little consequence.

We note too that the district court below in the first instance found the law sufficiently clear and granted Ward's motion for a preliminary injunction against Duffy's policy of strip searches. We vacated the injunction because of the *Lyons* teaching on standing and not on a determination as to the reasonableness of the policy.

Pre-1981 strip search cases, including *Tinetti,* harbinged our decision in *Giles v. Ackerman,* 746 F.2d 614, 619 (9th Cir. 1984). In *Giles* we established that strip searches of arrestees for a minor offense are unconstitutional absent individualized suspicion that such arrestee is carrying or concealing contraband or is suffering from a communicable disease.

In many ways the facts before us suggest the easiest possible case. First, Duffy's policy subjected Ward and other minor offense arrestees to a strip search even before an own recognizance (O.R.) release determination was made. Second, it was unlikely that arresting officers reasonably suspected that Ward possessed a weapon or contraband. In most instances the unreasonableness of a strip search conducted prior to an O.R. release determination is plain.

Duffy argues that he is shielded from civil liability because nine months prior to the search of Ward he was told by the Superior Court of California in *Hudler v. Duffy,* No. 404148 (Aug. 14, 1980), that the strip search policy was constitutional. The record indicates, however, that *Hudler* was a class action suit brought by custodial detainees. There is no suggestion that the *Hudler* decision involved arrestees awaiting own recognizance (O.R.) release determination.

Second, assuming *arguendo* that *Hudler* did speak to O.R. eligible detainees, the pronouncement of one state court on a constitutional issue does not necessarily shield a government official from liability. *See Capoeman v. Reed,* 754 F.2d at 1514 (in the absence of binding precedent, a court should look at all available decisional law including state courts, other circuits, and district courts to determine whether a right was clearly established). In light of contrary authority from federal courts, the decision by the California Superior Court did not *ipso facto* vindicate Duffy's policy.

If no reasonable ground existed for Duffy's blanket strip search policy as applied to Ward, we hold that the law in May of 1981 was sufficiently clear to subject Duffy to liability for civil damages under 42 U.S.C. § 1983. We remand to the district court to determine the reasonableness of the strip search policy. A finding of liability would necessitate a determination of damages.

ATTORNEY FEES

Ward argues entitlement to attorney fees in that the dissolved injunction put Duffy on notice that the strip searches in question could again be held unconstitutional. Even if true, the district court's determination that Ward did not achieve prevailing party status was not clearly erroneous.

A "prevailing party" for § 1988 purposes does not necessarily have to obtain formal relief. *Maher v. Gagne,* 448 U.S. 122, 129 (1980). A party can achieve "prevailing party" status by establishing a "clear, *casual relationship* between the litigation brought and the practical outcome realized." *Rutherford v. Pitchess,* 713 F.2d 1416, 1419 (9th Cir. 1983).

Ward's lack of standing in her original challenge rendered illusory the practical outcome she temporarily received (the preliminary injunction). A party may be awarded attorney fees as a prevailing

party at an interlocutory stage of the proceeding if the party prevails on the merits as to one or more of his or her claims. *Hanrahan v. Hampton,* 446 U.S. 754, 757-58 (1980). An erroneously granted injunction cannot be the basis for an award of attorney fees as the prevailing party.

REVERSED IN PART, AFFIRMED IN PART, AND REMANDED

APPENDIX B

LLOYD M. HARMON, JR., County Counsel
County of San Diego
HOWARD P. BRODY, Chief Deputy

By: PHILLIP L. KOSSY, Deputy

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San Diego, California 92101-2469

Attorneys for Defendant

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JUDITH A. WARD,	)	Civil No. 82-1386-GT(H)
	)	
Plaintiff,	)	ORDER GRANTING
	)	MOTION FOR SUMMARY
v.	)	JUDGMENT IN FAVOR
	)	OF DEFENDANT
JOHN F. DUFFY,	)	JOHN F. DUFFY AND
	)	JUDGMENT THEREON
Defendant.	)	

The motion for summary judgment of defendant JOHN F. DUFFY came on to be heard on June 29, 1984, before the Honorable Gordon Thompson, Jr., Chief District Judge presiding. Lloyd M. Harmon, Jr., County Counsel, by Phillip L. Kossy, Deputy County

Counsel, appeared as counsel for defendant; George Weingarten, Esq. appeared as counsel for plaintiff.

The Court having given due consideration of said matters, including pleadings filed, and good cause appearing therefor, concludes as follows:

1. The qualified immunity principles enunciated by the Supreme Court in the case of *Harlow v. Fitzgerald* (1982) 457 U.S. 800 are directly applicable to this cause;

2. When the conduct of which plaintiff now complains occurred in May 1981; the policy in question did not violate clearly established statutory or constitutional rights of which a reasonable person knew or should have known;

3. Defendant Duffy is immune therefore from civil liability under the Civil Rights Act of 1871, 42 United States Code Section 1983; and

4. As a result, there is no genuine issue as to any material fact and defendant is entitled to judgment as a matter of law.

Upon such conclusions,

IT IS ORDERED that the motion for summary judgment be, and hereby is, granted and that judgment be entered herein in favor of defendant dismissing this action, with costs and disbursements to be taxed by the Clerk in favor of defendant and against plaintiff.

It is therefore,

ORDERED, ADJUDGED AND DECREED that the action be, and hereby is, dismissed and defendant shall recover his costs and disbursements.

DATED: August 1, 1984

_____

JUDGE OF THE DISTRICT COURT

Approved as to form:

_____

GEORGE WEINGARTEN, Esq.
Attorney for Plaintiff

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Filed
August 20, 1986

JUDITH A. WARD, et al.,	)	No. 84-6362
	)	D.C.# CV 82-1386-GT(H)
Plaintiffs-Appellants,	)	
	)	ORDER DENYING
v.	)	PETITION FOR
	)	REHEARING AND
COUNTY OF SAN DIEGO, et. al.,)		SUGGESTION FOR
	)	REHEARING EN BANC
Defendants-Appellees.	)	

Before: GOODWIN, TANG, Circuit Judges, and JAMESON*, District Judge.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

* Honorable William J. Jameson, Senior District Judge for the District of Montana, sitting by designation.

No. _____

IN THE

Supreme Court of the United States

October Term, 1986

JOHN F. DUFFY,

Petitioner,

v.

JUDITH A. WARD,

Respondent.

PROOF OF SERVICE – CERTIFICATE BY BAR MEMBER

I, DANIEL J. WALLACE, one of the attorneys for petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of November, 1986, I served three (3) copies of the foregoing Petition

for Writ of Certiorari on respondent by mailing the copies in an envelope, with first class postage prepaid, addressed to her attorney of record, as follows:

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San Diego, California 92101

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Attorney for Petitioner

Supreme Court, U.S.
FILED
JAN 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-815 (2)

In the Supreme Court of the United States

October Term, 1986

JOHN F. DUFFY, Petitioner,

v.

JUDITH A. WARD.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

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No. 86-815

In the Supreme Court of the United States

October Term, 1986

JOHN F. DUFFY, Petitioner,

v.

JUDITH A. WARD.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. STATEMENT OF THE CASE

Respondent agrees with Petitioner's statement of the case. (Petition, pp. 3-4.)

II. FACTS

On May 30, 1981, respondent Judith Ward was arrested for the misdemeanor of interfering with a police officer (specifically, refusing to sign a traffic

citation). She was taken to the county's women's detention facility. A state statute (Calif. Penal Code, [former] sec. 853.6, subd. (i)) required that at the time any person arrested for a misdemeanor was received at a detention facility, an "immediate investigation" was to be made into whether the person would be released on a promise to appear ("O. R. release"). In fact, respondent was obviously eligible for immediate release and she was released O.R. very shortly after her arrival.

However, as a matter of policy the Sheriff, petitioner Duffy, did not enforce sec. 853.6(i). Rather than calling for an immediate investigation of the arrestee's eligibility for O.R. release, his policy called for an immediate strip search[1] of all arrestees, as though all arrested persons were a security threat and would necessarily be placed in the general jail population. Accordingly, respondent was forced to submit to a strip search.

III. CERTIORARI SHOULD NOT BE GRANTED TO REVIEW QUALIFIED IMMUNITY DOCTRINE

A. Introduction

Petitioner-defendant Duffy frames the issue as whether the Ninth Circuit has committed "a stunning 'reversal' of *Harlow* [v. *Fitzgerald*, 457 U.S. 800 (1982)]." (Petition for Cert., at p. 8.)

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[1] Specifically, the policy required the person to strip naked, bend over, and expose his/her genital and anal areas (as well as the rest of his/her body) to visual inspection.

Instead, petitioner seeks a stunning revision of civil rights immunity law. He argues for a rule of effective absolute immunity in the very large class of civil rights cases where there is no controlling case directly on point (i.e. involving essentially identical facts).

B. Doctrine

It is the major thesis of qualified immunity doctrine that unless he has violated "clearly established...rights," an official is immune. (*Harlow* v. *Fitzgerald*, *supra*, 457 U.S. at p. 818.) In several cases this court has alluded to an obvious corollary of the major thesis: where there happens to be no controlling case directly on point (i.e., involving essentially identical facts), resolution of the immunity issue turns on the general state of the law in that issue area.

In its clearest pronouncement on this point to date, in *Mitchell* v. *Forsyth*, 472 U.S. ___, ___, 86 L.Ed.2d 411, 431, fn. 12 (1985), this Court said: "We do not intend to suggest that an official is always immune from liability or suit for a warrantless search merely because the warrant requirement has never explicitly been held to apply to a search conducted in identical circumstances."

In various ways the court has alluded to this corollary in several other cases. (See, e.g., *Malley* v. *Briggs*, 475 U.S. ___, ___, 89 L.Ed. 2d 271, 278-281 (1986); *Davis* v. *Scherer*, 468 U.S. 183, 195 (1984); *Harlow* v. *Fitzgerald*, *supra*, 457 U.S. at p. 819.)

Indeed, this corollary is obvious -- inescapable, if the court is not to shrink the coverage of 42 U.S.C. sec. 1983 drastically by judicial manipulation of a rule which (after all) does not even appear in the text of sec. 1983.

Not surprisingly, the courts that have squarely faced the question of how to determine whether the law was "clearly established" in the absence of absolutely controlling case authority always seem to hold that a further inquiry into the state of the law is required (and not, as petitioner would have it, that the immunity question resolves automatically in the defendant's favor). (See, e.g., *Blackburn* v. *Snow* 771 F.2d 556, 570 (1st Cir. 1985); *Acoff* v. *Abston* (11th Cir. 1985) 762 F.2d 1543, 1547-1550; *Capoeman* v. *Reed* (9th Cir. 1985) 754 F.2d 1512, 1514-1515; *Bilbrey* v. *Brown* 738 F.2d 1462, 1465-1466 (9th Cir. 1984); *McGee* v. *Hester* (8th Cir. 1983) 724 F.2d 89, 91-92; *Doe* v. *Renfrew* 631 F.2d 91, 92-93 (7th Cir. 1980)[2]; see also, *B.C.R. Transport Co., Inc.* v. *Fontaine* (1st Cir. 1984) 727 F.2d 7, 10-11; *McCann* v. *Coughlin* (2d Cir. 1983) 698 F.2d 112, 125; and see *Lucas* v. *Hodges* (D.C. Cir 1984) 730 F.2d 1493, 1507 (vacated, 738 F.2d 1392).)

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[2] In the setting of a warrantless strip search, the *Doe* court reasoned: "Apart from any constitutional readings and rulings, simple common sense would indicate that the conduct of the school officials in permitting such a nude search was not only unlawful but outrageous under 'settled indisputable principles of law'" (quoting *Wood* v. *Strickland*, 420 U.S. 308, 321 (1975)).

To summarize, in the universe of cases where there is no directly controlling authority on identical facts -- a very large universe indeed-- there is and there should be no rule of automatic immunity, as petitioner would have it. There is instead a second level of inquiry, concerning the *legal reasonableness* of the defendant's conduct. Was it "objective[ly] legal[ly] reasonable[]" (*Harlow* v. *Fitzgerald*, *supra*, 457 U.S. at p. 819)? Could he have been "expected to know" (id.) the contours of the plaintiffs' rights? In short, is this an "unjustified lawsuit" (*Davis* v. *Scherer*, *supra*, 468 U.S. at p. 195)?

The Ninth Circuit faced this problem in *Capoeman* v. *Reed*, *supra*, 754 F.2d 1512. It is a soundly reasoned decision, entirely in line with this Court's qualified immunity cases.

The issue in *Capoeman* was whether it was clearly established in 1981 that prisoners have the right on religious grounds to resist haircuts. The court concluded that it was not, and affirmed a defendant's summary judgment on immunity grounds.

Stating the applicable rule the court said: "[I]n the absence of binding precedent, a court should look to whatever decisional law is available to ascertain whether the law is clearly established . . .." (754 F.2d at p. 1514.)

Capoeman is entirely consistent with this Court's decisions on the issue of qualified immunity. And the Ninth Circuit's decision in this case is entirely consistent with *Capoeman*. All the circuit court did was to determine that the objective

criteria, that is, the actual facts of the case and the relevant doctrine and case law, proved sufficient to establish clearly that respondent had a right not to be treated as petitioner treated her.

C. The Doctrine As Applied

The foregoing establishes that there is nothing doctrinally unsound or incorrect about the Ninth Circuit's opinion. For that reason alone, the petition for certiorari should be denied. It is a matter of much less concern to this Court when the right doctrine has yielded an arguably undesirable result than when the lower courts are misinterpreting the doctrine.

But on that other level it is clear that the Ninth Circuit's *result* is correct under the controlling law, and there is no call or need for clarification by this Court. No other result could obtain, on these facts, without a major judicial revision of civil rights immunity doctrine.

Respondent was searched under a *blanket policy* according to which "all persons received on criminal charges" (Declaration of Clifford R. Powell, Excerpt of the Record filed Oct. 20, 1983, p. 90, line 20-21) were strip searched. No justification was offered for the policy in petitioner's moving papers or in the hearing below, other than the truism that respondent was "received on criminal charges."

Thus, the *fact* here is that respondent was stripped naked and every square inch of her body was carefully searched, without the slightest

consideration of the likelihood that she might be in possession of a concealed weapon or of contraband, without any consideration for whether she might pose a security risk to the institution where she was so briefly held.[3] There was no inquiry of any kind into specific facts that might justify a search.

Let it be assumed that there was no meaningful case law, at that time, on strip searches of persons arrested on minor charges.[4] Still, there remained the question whether it was clearly established that a search of a most demeaning, embarrassing, intrusive nature, without a warrant and without cause to believe something was secreted on the person, without any reason to be concerned about the security of the jail, was unconstitutional.

Although there was no absolutely controlling case law on identical facts, there was *relevant* and *persuasive* case law which solidly established that this strip search, under these circumstances, was

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[3] It bears repeating that once some inquiry was made respondent was found clearly eligible for O.R. release, i.e., not a candidate for inclusion in the jail population, and that she was in fact released on O.R. and never intermingled with the population.

[4] This is not really true, of course. See *Tinetti* v. *Wittke*, 479 F.Supp. 486 (E.D. Wis. 1979), *affd.*, 620 F.2d 160 (7th Cir. 1980). The one more or less identical case existing at the time held that such searches were and are unconstitutional, as the circuit court correctly noted in its opinion below.

unconstitutional. Petitioner had to look no farther than this Court's opinion in *Bell* v. *Wolfish*, 441 U.S. 520 (1979).

One issue in *Bell* was the constitutionality of a policy by which pretrial detainees were strip searched after all contact visits. In holding the practice constitutional, the Court said: "Admittedly, this practice instinctively gives us the most pause. * * * The Fourth Amendment prohibits only unreasonable searches [citation] and under the circumstances, we do not believe that these searches are unreasonable. [*para.*] The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." (441 U.S. at pp. 558-559.)

The Court proceeded to recount the "unique" and "serious" security problems characteristic of detention facilities. While "not underestimat[ing] the degree to which these searches may invade the personal privacy of inmates" (*id.* at p. 560), the Court concluded that on balance "the significant and legitimate security interests of the institution" (*id.*) were sufficiently weighty to justify the searches after contact visits.

It could not be clearer that in the case of the strip search of respondent, the balance tips sharply the other way. The value of the "invasion of personal rights" was essentially the same as in *Bell*, while "the need for the particular search," which *Bell* requires to be balanced against that substantial

personal interest, sums to zero, nothing. There was *no* justification of any kind for the strip search. There was *no* suspicion that respondent was carrying a weapon or contraband, and *no* prospect that she would mingle with the jail population.

On the facts, it could not have been clearer, on the day of the search in this case, that the law did not permit this search.

IV. CERTIORARI SHOULD NOT BE GRANTED TO REVIEW THE CIRCUIT COURT'S ANALYSIS OF THE TERMS OF A COLLATERAL JUDGMENT

Petitioner makes a second, minor argument that the Ninth Circuit erred in denying him immunity for assertedly having relied upon a state court trial level decision in another case (styled *Hudler* v. *Duffy*, see petition, part II, pp. 10-11.) He offers no reason why this utterly unique and mundane issue should concern the Supreme Court of the United States. Moreover, absolutely nothing is brought before this Court to demonstrate the scope of the issues in *Hudler* or to show the order in question. The Court is asked simply to believe petitioner's assertions about it.

Parts of the *Hudler* file, at least, were before the Ninth Circuit, and that court dispatched the issue summarily. The *Hudler* case, the circuit court said, concerned only custodial detainees, a class of persons as to whom strip search principles are entirely different than they are for persons like respondent. The Ninth Circuit concluded that the

Hudler case was wholly irrelevant to the issues in this one.

As petitioner makes no showing of why this holding should be reversed, his second argument should be rejected summarily. The absence of any useful information about *Hudler* strongly implies that the Ninth Circuit read the record correctly and Petitioner would misinterpret it in hopes of getting the case re-heard.

V. CONCLUSION

The petition for certiorari is structured as a request for correction of an error committed by the Ninth Circuit, but in reality it is a request for a radical alteration of civil rights immunity law. No justification for this change is offered, and it seems sure that such a change would flaunt the will of Congress.

This petition should be denied.

DATED: January 15, 1987

Respectfully submitted,

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